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FAMILY LAW

Cases and Materials

Volume III

Brenda Cossman
Faculty of Law
University of Toronto

2022-2023

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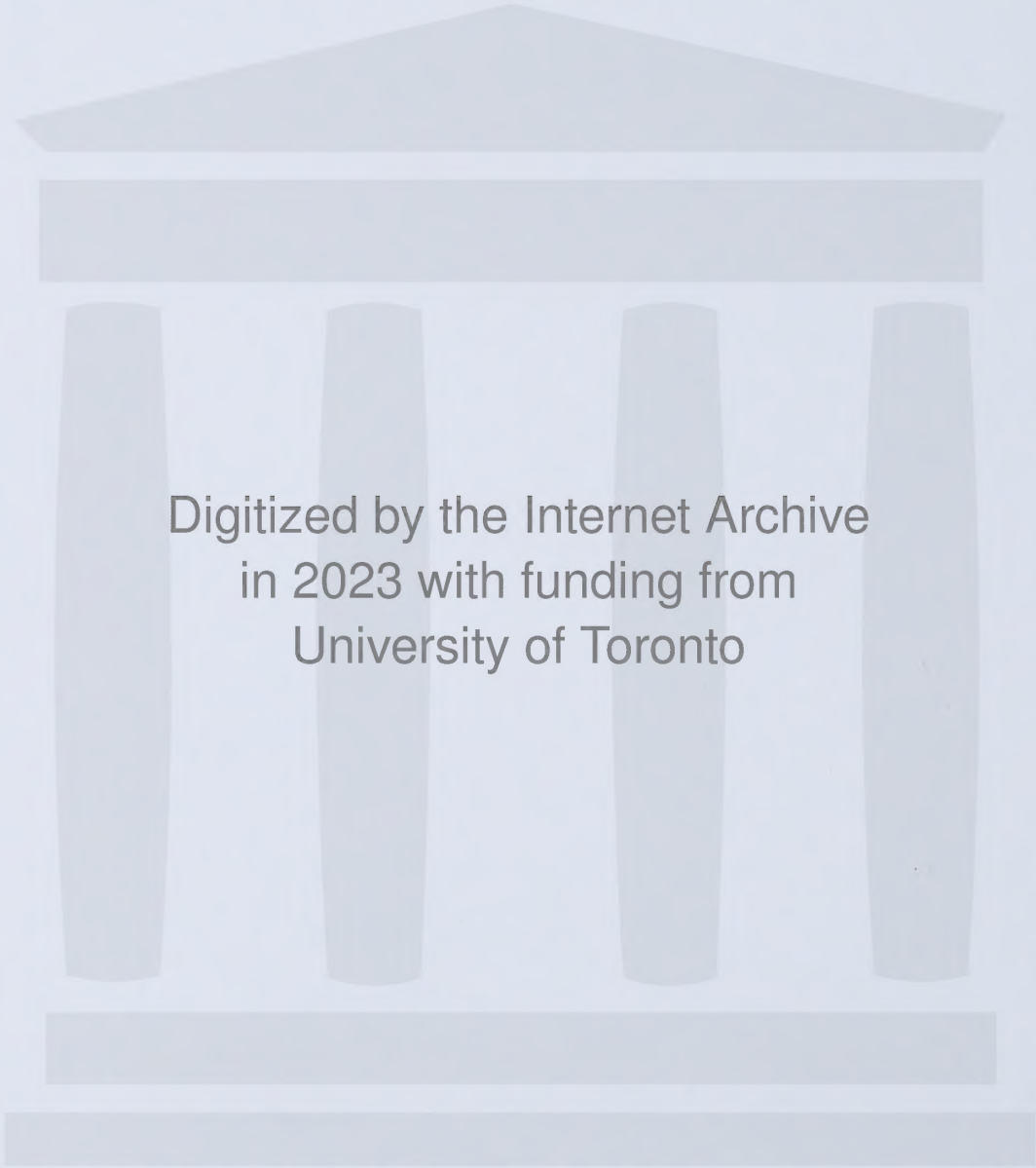

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VII. CHILD SUPPORT

A. Support Obligations: Child Support and Spousal Support

1. Relationship between Child and Spousal Support

Although this was not historically the case, our law now recognizes two distinct support (or maintenance) claims—child support and spousal support—each governed by different principles. When there are dependent children, child support is dealt with first; it is the first claim on the payor's income. This priority is explicitly recognized in s. 15.3(1) of the *Divorce Act*:

> **15.3**(1) **Priority to child support.**—Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

As you will also see, the basic definition of "income" for the purposes of determining child support is income before payment of spousal support.

2. Jurisdiction

Jurisdiction over both child and spousal support is divided between the federal and provincial governments. While maintenance and support *per se* have long been considered as matters of property and civil rights within the jurisdiction of the provinces pursuant to s. 92(13) of the *Constitution Act, 1867*, the jurisdiction of the federal government to make provisions for maintenance in relation to a divorce decree has been held to fall within its area of legislative competency in relation to marriage and divorce and matters ancillary thereto pursuant to s. 91(26); see *Zacks v Zacks* (1973), 10 RFL 53 (SCC), and *Vandeboncoeur v Landry* (1977), 23 RFL 360 (SCC). As a general rule, when support (either child or spousal) is being requested in the context of a divorce proceeding or after the spouses have divorced, applications are made under the federal *Divorce Act*, *1985*. Provincial legislation—in Ontario Part III of the *Family Law Act, 1986*—governs support applications in other contexts—those involving married couples who have separated but are not seeking a divorce, common law couples, and in the case of child support, parents who never lived together.

Jurisdictional issues arise when an order has been obtained in proceedings under the *Family Law Act* and proceedings are subsequently brought under the *Divorce Act*. If there has been no adjudication of the application under the *Family Law Act*, s. 36(1) provides that an application for support under Part III of the *Family Law Act* is stayed when a divorce proceeding is commenced under the *Divorce Act*, unless the court orders otherwise. If however, an interim or final order has been obtained under the *Family Law Act* before the proceedings under the *Divorce Act* are brought, the support order continues in force until such time as it may be superceded by a support order made under the *Divorce Act*; see *Pantry v Pantry* (1986), 53 OR 667 (Ont CA), and *Mongrain v Mongrain* (1986), 1 RFL (3d) 330 (Ont HC).

The materials in this chapter will focus on the determination of child support under s. 15.1 of federal *Divorce Act, 1985* and the federal Child Support Guidelines (CSG) enacted thereunder. However you should be aware that child support claims may also be made under provincial legislation—in Ontario under s. 31 of the *Family Law Act, 1986* and the Ontario Child Support Guidelines enacted thereunder. Given that the provincial child support guidelines mirror the federal guidelines, the child support outcomes will be the same under both provincial and federal law. You should also note

that under the Ontario FLA, s. 32 places a reciprocal obligation on (adult) children to support their parents.

3. Components of a Support Analysis

Although child support and spousal support are governed by quite distinct principles, the three basic issues that need to be addressed in any support application are the same:

(i) entitlement
(ii) quantum (i.e. amount)
(iii) duration

Support orders can take different forms, the most common being on-going, *periodic* payments (eg. a certain amount to be paid per month), but *lump sum* payments are also possible.

Interim support orders (based on affidavit evidence) can be made pending a full hearing and a "final" order. (For child support see *Divorce Act*, s. 15.1(2) and for spousal support s. 15.2(2)).

Support orders are never "final"—unlike orders under Part I of the FLA equalizing net family property, support orders are always open to *variation* to deal with changing circumstances over time. Under the *Divorce Act*, variation of support orders is provided for by s. 17(1), with s. 17(4) setting out the specific factors governing variation of child support and s. 17(4.1) those governing spousal support. Both provisions refer to a "change of circumstances" as the threshold test for variation. With respect to child support, s. 14 of the Child Support Guidelines provides further elaboration of what constitutes a change in circumstances. With respect to variation of spousal support orders, case law has elaborated a test of "material change in circumstances."

When making either initial orders for support or varying existing orders, courts may make orders in respect of periods of time prior to the date of the originating application or the variation application. This is called *retroactive support.* Different principles guide the awarding of retroactive child support and spousal support. For child support, the leading case is the Supreme Court of Canada's decision in what is referred to as the *DBS* case: *S(DB) v G(SR)*, [2006] 2 SCR 231, 2006 SCC 37, (found below).

4. Tax Treatment of Child and Spousal Support

Until the reforms to child support law in 1997 that introduced the Child Support Guidelines, child support and spousal support were subject to similar treatment for purposes of income tax—the so-called deduction/inclusion rules. Thus payors were able to deduct from their taxable income periodic payments of child and spousal support and recipients were required to include these amounts in their taxable income. As a result of the 1997 reforms, the tax treatment of child support was changed so that it is no longer subject to the deduction/inclusion rules. Thus payors are no longer able to deduct child support and recipients are not required to include it in their income. (As a result payors have to pay child support out of net income and for recipients child support is tax free.) *Periodic* payments of spousal support pursuant to court orders or written agreements remain deductible from income by the payer and included in the income of the recipient for income tax purposes. (See *Income Tax Act*, R.S.C., 1985, c 1 (5th Supp.), ss. 56, 56.1, 60, 60.1 and 252(1) as reproduced in the statutory materials.) *Lump sum* spousal support payments are not subject to the deduction/inclusion rules.

VIII. SPOUSAL SUPPORT

A. Some Preliminary Issues of Jurisdiction and Standing

1. Jurisdiction

Jurisdiction over spousal support is divided between the federal and provincial governments. While the materials in this chapter will focus on the legal regulation of spousal support under the federal *Divorce Act, 1985*, you should be aware that spousal support claims may also be made under provincial/territorial legislation—in Ontario under the *Family Law Act, 1986.* In general, the principles of spousal support articulated under the *Divorce Act* have influenced the interpretation of provincial support legislation, although in some cases there are distinct differences in wording (reflecting different policy choices) that must be recognized. The spousal support provisions of the Ontario *Family Law Act* and the *Divorce Act* explicitly endorse the same four objectives for spousal support, but the *Family Law Act* contains a much more detailed list of factors to be taken into account and, as well, offers a more extensive array of remedial powers. The Spousal Support Advisory Guidelines (2008), a set of informal guidelines developed as a practical tool to assist in the determination of the amount and duration of spousal support under the *Divorce Act* are in practice also used under provincial support legislation.

The provisions of the federal *Divorce Act* in relation to support for divorced persons have been held to be paramount over provincial legislation; see *Richards v Richards* (1972), 7 RFL 360 (SCC). An application for support under the *Family Law Act* must be brought while the parties are still spouses within the definition of the Act. Applications cannot be made after divorce. If no application for support was made in the divorce proceedings and a divorce was granted, any subsequent application for support must be made as a corollary relief claim under the *Divorce Act*: *Richards, supra*.

2. Standing—Who Can Apply?

(a) *Divorce Act, 1985*: Spouses and Former Spouses

An application may be made for interim or permanent spousal or child support by either or both spouses or former spouses pursuant to subsections 15(1), (2) and (3) of the *Divorce Act, 1985*. Applications for support can be made in the divorce proceedings or in separate corollary relief proceedings following the divorce.

(ii) The *Family Law Act, 1986*: Extended Definition of Spouse

Support obligations are dealt with in Part III of the *Family Law, 1986*. An application may be made for interim or permanent spousal or child support by a dependent or a dependent's parent as defined and/or by a public agency (see ss. 33(2), (3)). A dependent, as defined in s. 29 is "a person to whom another has an obligation to provide support." These obligations are set out in ss. 30, 31, and 32. Section 30 provides for the obligation of spouses. The definition of "spouse" in s. 29 of the Act has been extended beyond married couples to include unmarried couples who have cohabited continuously for a period of not less than three years or in a relationship of some permanence, if they are the natural or adoptive parents of a child. Cases determining whether unmarried cohabitants are spouses can be found in volume. I of the materials, together with the *M v H* decision.

B. The Legal Framework for Domestic Contracts

The law that governs domestic contracts and that determines what effect they will have is complex. The rules are a mix of statute and common law. As a starting point, the general law of contract, including doctrines such as unconscionability, applies to domestic contracts, but often the common law of contract has been modified or supplemented by legislative provisions, either provincial or federal. In some cases additional statutory requirements, such as requirements of form or of disclosure, have been imposed as a condition of enforceability; in other cases legislatures have chosen to limit the ability of parties to completely opt out of rights and obligations created by family law legislation and have retained some degree of judicial oversight of the fairness of agreements. Some of the legal rules relating to domestic contracts are general and apply to all domestic contracts; others relate only to agreements dealing with particular rights and obligations, such as custody and access or child support or spousal support. Some of the rules give courts the power to *set aside* or *invalidate* an agreement; some simply limit the effect of an agreement and allow the court to make an order different from the outcome contemplated by the agreement if warranted (sometimes this is called "overriding" the agreement, sometime, inaccurately, "varying" the agreement).

As a starting point, read Part IV of the Ontario *Family Law Act*, which deals with domestic contracts. Think about the kinds of contracts that are permitted, the required formalities, and the limits that are imposed on contracting. As will be discussed below, these provisions in Part IV of the *FLA* are supplemented by additional provisions in other parts of the *FLA* and the *Divorce Act*, depending upon the subject matter of the contract.

The leading case on domestic contracts and the competing pulls of autonomy/certainty versus fairness is the Supreme Court of Canada's decision in *Miglin v Miglin,* [2003] 1 SCR 303, found below in the readings on spousal support agreements. Although *Miglin* dealt specifically with the courts' overriding discretion under the *Divorce Act* to order spousal support other than as provided for by an agreement, the ideas in *Miglin* have become the starting point for the discussion of the treatment of domestic contracts in many other contexts. In *Hartshorne v Hartshorne*, [2004] 1 SCR 550, the ideas from *Miglin* were used to shape the discretion under B.C.'s *Family Relations Act* to vary unfair property agreements. As well, in *Rick v Brandsema,* [2009] 1 SCR 295, the ideas from *Miglin* were drawn upon to reshape the doctrine of unconscionablity as applied to domestic agreements. Both *Hartshorne* and *Rick* are dealt with in more detail below, in the section of the materials dealing with unconscionability.

To what extent are parties allowed to opt out the default regime of rights and obligations established by family law legislation? Section 2(10) of the Ontario *Family Law Act* deals explicitly with the effect of an agreement and provides that a domestic contract prevails over the Act unless the Act provides otherwise:

> **2(10) Act subject to contracts.** A domestic contract dealing with a matter that is also covered by this Act prevails unless this Act provides otherwise.

There is no similar provision in the *Divorce Act* and the effect of an agreement on the matters covered by the Act has been worked out through judicial interpretation. Under both pieces of legislation, the effect of an agreement varies depending upon the subject matter of the agreement.

(a) property agreements

In some provinces legislation has given courts the power to set aside or override unfair property agreements. For example in British Columbia under its former *Family Relations Act* (now repealed), courts were given a statutory power to reapportion matrimonial property other than as provided for by a domestic contract if the contractual result would be "unfair". No such power to vary the property provisions of a domestic contract exists under Ontario's *Family Law Act*. Thus, a property agreement will prevail over the provisions of Part I of the FLA unless:

(i) the agreement is unenforceable under s. 55 because it is not in the proper form,
(ii) the agreement can be set aside under s. 56(4) of the FLA, which includes the general provisions of contract law and a statutory duty of disclosure,
(iii) the agreement can be set aside under s. 56(5) because the removal of barriers to religious remarriage was a consideration in the making of the agreement.

The setting aside of agreements because of non-disclosure or unconscionability or will be examined in the next section of the materials.

(b) spousal support agreements

Courts have more ability to set aside or override unfair spousal support agreements than they do unfair property agreements. Under the Ontario *FLA*, s. 33(4) limits the effect of spousal support agreements, giving courts, *inter alia*, the power to set aside spousal support agreements that result in "unconscionable circumstances":

> **33(4) Setting aside domestic contrac**t. The court may set aside a provision for support or a waiver of the right to support in a domestic contract or paternity agreement and may determine and order support in an application under subsection (1) although the contract or agreement contains an express provision excluding application of this section,
> (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;
> (b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or
> (c) if there is default in the payment of support under the contract or agreement at the time the application is made.

Under the 1985 *Divorce Act* s. 15.2(4)(c) provides that a spousal support agreement is simply one factor that a court must consider in awarding spousal support. The weight to be given to a spousal support agreement is thus a matter of discretion and the principles governing how that discretion is to be exercised have shifted over time through a series of SCC decisions, with the current approach found in the court's 2003 decision in *Miglin*. Spousal support agreements are dealt with in more detail in a separate section below.

(c) child support agreements

The judicial treatment of contracts dealing with child support is dealt with in Chapter VII, Child Support (above). Part of the package of reforms that introduced child support guidelines for the determination of child support amounts under both the *Divorce Act* and the *FLA* introduced stringent limits on contracting out of the guidelines.Under both statutes courts are required to order child support in the amount determined by the guidelines (*FLA*, s. 33(11), *DA*, s. 15.1(3)) unless there are special financial provisions in an agreement that benefit a child and replace child support (*FLA*, s. 33(12), *DA*, s.

15.2(5)). Under the *FLA,* s. 56 (1.1), found in Part IV of the Act which deals with domestic contracts, also provides:

> **56 (1.1) Contracts subject to child support guidelines.** In the determination of a matter respecting the support of a child, the court may disregard any provision of a domestic contract pertaining to the matter where the provision is unreasonable having regard to the child support guidelines, as well as to any other provisions relating to support of the child in the contract.

(d) other agreements about children

Under both the *FLA* and the *Divorce Act*, a discretion to make orders other than as provided for in a domestic contract clearly exists with respect to all matters relating to children.

Section 56(1) of the *FLA* provides:

> **56(1) Contracts subject to best interests of child.** In the determination of a matter respecting the education, moral training, or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child.

Courts have interpreted the custody and access provisions of the *Divorce Act* as providing for a similar discretion.

D. Spousal Support Agreements

Under the Ontario *FLA,* s 33(4) limits the effect of spousal support agreements, giving courts, *inter alia*, the power to set aside spousal support agreements that result in "unconscionable circumstances":

> **33(4) Setting aside domestic contract**. The court may set aside a provision for support or a waiver of the right to support in a domestic contract or paternity agreement and may determine and order support in an application under subsection (1) although the contract or agreement contains an express provision excluding application of this section,
>
> (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;
>
> (b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or
>
> (c) if there is default in the payment of support under the contract or agreement at the time the application is made.

Under the 1986 *Divorce Act*, s. 15.2(4)(c) provides that a spousal support agreement is one factor that a court must consider in awarding spousal support. The weight to be given to a spousal support agreement is thus a matter of discretion and the principles governing how that discretion is to be exercised have shifted over time through a series of SCC decisions. Initially the court's 1987 *Pelech* trilogy (found above in Part VIII of the materials dealing with spousal support) applied, which precluded courts from overriding spousal support agreements on broad fairness grounds, and restricted courts to a stringent test of variation in cases involving final settlements: courts were only allowed to override the agreement if they found a radical unforeseen change of circumstances causally connected to the marriage. The trilogy cases were subject to much criticism, in part because of an excessive emphasis on finality which removed the necessary element of flexibility in dealing with on-going support obligations, but even more so because of the undue emphasis placed on the value of achieving spousal self-sufficiency after divorce. The applicability of the *Pelech* trilogy, which had been decided under the 1968 *Divorce Act*, to the new statutory context of the 1986 *Divorce Act*, was questioned, particularly after the SCC's *Moge* decision in 1992. However, the issue of whether the values endorsed by the court in *Moge* would result in a softening of the *Pelech* rules for contractual cases remained unclear for over a decade, however.

In the first spousal support agreement case that reached the SCC after *Moge*, *Masters v Masters*, [1994] 1 SCR 883 the court essentially avoided the issue. In the second case, *G (L) v B (G),* [1995] 3 SCR 370; only L'Heureux-Dubé J., writing for a minority of the Court, was willing to address the issue, ruling that under the 1986 *Divorce Act* the causal connection test from the *Pelech* trilogy was not applicable and that an agreement was only one factor to be considered by a court in awarding spousal support. In the absence of clear guidance from the SCC, some lower courts began, in various ways to depart from the stringency of the *Pelech* test. Some followed L'Heureux-Dubé J's minority reasons in *G (L) v. B (G)* and began to apply a "fairness" test. Some as in *Santosuosso v Santosuosso* (1997), 27 RFL (4th) 234 (Ont Div Ct) began to soften the forseeability requirements under the trilogy's causal connection test. Adopting a subjective approach to foreseeability (i.e., was the change "unforeseen" rather than "unforeseeable") they were willing to find that when contracts releasing or time-limiting support were premised on the expectation that the former wife would become self-sufficient, the failure to become self-sufficient was "unforeseen" and would constitute a radical change in circumstances. The law remained in a state of confusion until the *Miglin* decision of the SCC in 2003.